

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ERICK GARCIA,

Defendant and Appellant.

H041861

(Monterey County

Super. Ct. No. SS140159)

I. INTRODUCTION

Defendant Erick Garcia appeals after a jury convicted him of felony assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1))¹, felony battery with serious bodily injury (§ 243, subd. (d)), misdemeanor assault (§ 240), and misdemeanor battery (§ 242). The jury found that defendant personally inflicted great bodily injury in the commission of the felony assault (§ 12022.7, subd. (a)) and that he personally used a deadly weapon in the commission of the felony battery (§ 12022, subd. (b)(1)). Defendant was sentenced to a seven-year prison term.

On appeal, defendant contends there was insufficient evidence to support his conviction of felony battery with serious bodily injury and insufficient evidence to

¹ All further statutory references are to the Penal Code unless otherwise noted.

support the finding that he personally inflicted great bodily injury in the commission of the felony assault. In the alternative, he contends that the jury may have relied on an incorrect legal theory in finding serious bodily injury and great bodily injury. Defendant also contends the trial court erred by failing to give a unanimity instruction that would have told the jury it had to be unanimous as to the act causing serious bodily injury and great bodily injury.

For reasons that we will explain, we will affirm the judgment.

II. BACKGROUND

A. Testimony of Neighbors and Deputy

On January 15, 2014, at around 11:00 p.m., residents of Springpoint Road in Castroville heard a woman scream. A Monterey County Sheriff's deputy was dispatched to the location, where he contacted Jane Doe One, another resident of Springpoint Road. Doe One was crying hysterically and bleeding from her hands. There were several pools of blood in Doe One's house, and Doe One had cuts on her hands and on her body, including a "pretty big" laceration under her right breast.

Doe One pointed to a car associated with her attacker, which was parked in front of the residence across the street from her house. Defendant was found in that residence, lying on a bed with sheets or blankets pulled up over his head. Defendant had scratches on his nose, cheek, forehead, and chest. He had cuts on his hand and finger and dried blood around his mouth. Defendant was wearing boxer shorts, which had the crotch torn out.

B. Doe One's Testimony

On the night of the assault, Doe One was home with her two young children; her husband was at work. Doe One heard knocking at her door at around 10:20 p.m. or 10:30 p.m. She looked through a window and recognized defendant, one of her

neighbors. Doe One unlocked her door, opened it slightly, and asked what defendant wanted. She noticed that defendant was wearing gloves, sunglasses, and a beanie.

Defendant turned towards Doe One, holding a large knife. Doe One started to close the door, but defendant put his foot in the way of the door closing and stepped inside her house. Defendant raised the knife and “charged” towards Doe One. Doe One asked, “What are you doing,” and she tried to grab defendant’s wrists.

Defendant told Doe One, “You know why I’m here, bitch, just give me what I want. I know your husband’s not home.” Defendant began kissing Doe One on the face and neck, then fell on her, causing her to end up on the floor. Doe One was hitting defendant, who told her, “Stop fighting, bitch, or I’m gonna kill you.” Doe One screamed for someone to help.

Defendant pulled Doe One’s pants and underwear down. When Doe One tried to pull her clothes back up, defendant hit her. Defendant also pulled his own pants down and tried to force Doe One’s legs apart, while Doe One tried to clench her legs together. Doe One felt defendant’s penis on her thigh, and she felt his hands on her breasts. Defendant told Doe One, “Shut up, bitch, or I’m gonna kill you.”

Doe One was eventually able to get out from under defendant. She crawled towards the front door, but defendant pulled her back and said, “If you open that door, I’m gonna kill you.” As defendant pulled Doe One, he put the knife on her chest, under her right breast. Defendant cut her with the knife, underneath her breast.

Doe One and defendant ended up on the couch, where defendant began to touch Doe One’s vaginal area while she tried to push his hand away. Defendant still had the knife, and Doe One grabbed it to prevent defendant from stabbing her. Doe One’s fingers were cut when she grabbed the blade. Defendant and Doe One struggled over the knife. Defendant bit Doe One in two places and continued kissing her and trying to spread her legs open.

Doe One noticed her daughter (Jane Doe Two) in the room. Doe One said, “Please go get help. This bad guy is trying to kill mommy.” Doe Two ran towards the back door. Defendant heard the noise of Doe Two moving a chair, and he got up and left. Doe One called 911.

Doe One went to the hospital via ambulance. Several of her fingers were sutured and the laceration under her breast was repaired with surgical glue. At the time of trial, she had some scar tissue on her chest, but the injury had healed “pretty well.” She had lost some function in her fingers, however. One of the joints in her middle finger did not bend, her pointer finger had scar tissue, and her pinkie finger was “permanently bent at the first joint.” The strength in her hands was diminished.

C. Defendant’s Testimony

On the day of the incident, defendant worked until 5:00 p.m., then purchased beer on his way home. At home, he took a shower and started drinking the beer. Defendant’s girlfriend’s daughter told him that Doe One’s husband had been “coming over and bothering her and making her feel uncomfortable.”

Defendant continued drinking beer and eventually went outside, where he listened to music in his car. At some point, he went over to a trash can, where he saw that a rug had been thrown away. Defendant decided to cut the rug into pieces, using a knife that he found near his shed, because the rug was taking up a lot of space in the trash can. He put on some gloves that were in his car before cutting the rug into pieces. After defendant finished cutting the rug, he noticed that there was a light on in Doe One’s house. He decided to go speak with Doe One about her husband’s behavior. He “mistakenly” took the knife and gloves with him.

Defendant knocked on Doe One’s front door, and when she opened the door, he put his foot in the doorway so that she could not close it. He “fell forward with no bad intention,” thus entering her house. Doe One immediately tried to grab his hand, which was holding the knife. They struggled over the knife. Doe One grabbed the knife blade

during the struggle, cutting her hand. Defendant then ran out of her house. He sustained injuries and tore his clothes when he went over or through a fence, then went back to his house.

Defendant denied that he had tried to pull Doe One's pants down, tried to kiss her, or pulled his own pants down. He did not remember putting the knife to Doe One's chest.

D. Trial Proceedings

Defendant was charged with assault during a first degree burglary with the intent to commit a sex offense (count 1; § 220, subd. (b)), first degree burglary (count 2; § 459), attempted forcible rape (count 3; §§ 664, 261, subd. (a)(2)), criminal threats (counts 4 & 7; § 422, subd. (a)), assault with a deadly weapon (count 5; § 245, subd. (a)(1)), child abuse (count 6; § 273a, subd. (a)), and mayhem (count 8; § 203).

As to counts 1 and 3, the information alleged that defendant inflicted great bodily injury in the commission of a sex offense. (§ 12022.8.) As to counts 2, 4, 5, and 7, the information alleged that defendant personally inflicted great bodily injury. (§ 12022.7, subd. (a).) As to all counts except count 5, the information alleged defendant used a deadly weapon. (§ 12022, subd. (b)(1).)

The prosecution argued that defendant was guilty of all counts and that he had inflicted great bodily injury on Doe One during the incident, calling the jury's attention to "the injuries to her fingers, as well as the [laceration to] her breast."

Defendant's trial counsel conceded that defendant had made some "poor decisions" while he was drunk and that defendant had "hurt" Doe One, but he argued that defendant did not intend to commit a sexual assault.² Defendant's trial counsel argued

² The jury was instructed that it could consider evidence of defendant's voluntary intoxication "in deciding whether the defendant acted with the specific intent required for the crime of assault with intent to commit rape during a first degree burglary [count 1]; (continued)

that neither the hand lacerations nor the laceration under Doe One's breast met the standard for great or serious bodily injury.

As to count 1, the jury found defendant not guilty of burglary with the intent to commit a sex offense, but it found him guilty of misdemeanor assault (§ 240), a lesser included offense. As to count 3, the jury found defendant not guilty of attempted forcible rape, but it found him guilty of misdemeanor battery (§ 242), a lesser included offense. As to count 8, the jury found defendant not guilty of mayhem, but it found him guilty of felony battery with serious bodily injury (§ 243, subd. (d)), a lesser included offense, and it found that defendant personally used a deadly weapon in the commission of the felony battery (§ 12022, subd. (b)(1)). The jury found defendant guilty of count 5, felony assault with a deadly weapon (§ 245, subd. (a)(1)), and it found that defendant personally inflicted great bodily injury in the commission of that offense (§ 12022.7, subd. (a)). The jury found defendant not guilty of counts 2, 4, 6, and 7 (first degree burglary, criminal threats, and child abuse).

At defendant's sentencing hearing, the trial court imposed the upper term of four years for the felony assault (count 5) with a consecutive three-year term for the associated great bodily injury allegation. The trial court stayed the term for the felony battery with serious bodily injury (count 8) and the associated deadly weapon use allegation, pursuant to section 654. The trial court imposed concurrent county jail terms for counts 1 and 3 (misdemeanor assault and misdemeanor battery).

the specific intent required for the crime of residential burglary with person present [count 2]; the specific intent required for the crime of attempted forcible rape [count 3]; the specific intent required for the crime of criminal threats [counts 4 and 7]; and the specific intent required for the allegation of personal use of a deadly weapon.” (See CALCRIM No. 3426.)

III. DISCUSSION

A. *Sufficiency of the Evidence*

Defendant contends the evidence was insufficient to support the jury's finding that he inflicted serious bodily injury, a required element of section 243, subdivision (d), and the jury's finding that he personally inflicted great bodily injury, as required for the section 12022.7, subdivision (a) allegation.

1. Standard of Review

In addressing the question of whether there was sufficient evidence to support defendant's conviction, “ ‘we review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]’ ” (*People v. Cravens* (2012) 53 Cal.4th 500, 507.)

2. Definitions of “Serious” and “Great” Bodily Injury

Section 243, subdivision (f)(4) defines “[s]erious bodily injury” as “a serious impairment of physical condition, including, but not limited to, the following: loss of consciousness; concussion; bone fracture; protracted loss or impairment of function of any bodily member or organ; a wound requiring extensive suturing; and serious disfigurement.” Section 12022.7, subdivision (f) defines “great bodily injury” as “a significant or substantial physical injury.”

The parties dispute whether we should consider Doe One's injuries separately or together. The Attorney General cites *People v. Robbins* (1989) 209 Cal.App.3d 261 (*Robbins*) for the proposition that in determining whether a victim “suffered that quantum of injury legally defined as great bodily injury . . . , the entire course of conduct and its overall result - not each act and individual injury - must be examined.” (*Id.* at p. 265.)

Defendant acknowledges that “[c]onsidering cumulative injury is proper when an assault constitutes an indivisible transaction.” However, he contends that the evidence in

this case showed two separate incidents leading to injury rather than “one prolonged assault.” Defendant’s argument is based on his contention that the jury “accepted [his] version of the events,” in which Doe One suffered the injuries to her hand “immediately,” when she grabbed the knife, but suffered the laceration to her chest during the “ensuing struggle.”

Contrary to defendant’s contention, his trial testimony did not establish that the struggle over the knife started after Doe One suffered the injuries to her hands. Defendant testified that after he entered Doe One’s residence, Doe One immediately tried to grab his hand, which was holding the knife. Defendant testified that they then struggled over the knife, and that during the struggle, Doe One grabbed the knife blade, cutting her hand.³ Thus, even under defendant’s version of the events, all of Doe One’s injuries occurred during one indivisible course of conduct, such that the injuries must be considered collectively, not individually, in determining whether defendant inflicted great or serious bodily injury. (See *Robbins, supra*, 209 Cal.App.3d at p. 265.)

Since we have concluded that Doe One’s injuries must be considered collectively, not individually, and since defendant concedes that Doe One’s hand injuries qualify as “serious” and “great” bodily injury, we need not consider whether the laceration under Doe One’s breast, alone, would qualify as “serious” or “great” bodily injury.⁴

3. Defendant Directly Caused Doe One’s Injuries

Defendant contends there was insufficient evidence to support the section 12022.7, subdivision (a) enhancement and his conviction under section 243, subdivision (d)

³ Defendant testified: “She immediately without letting me say anything tried to grab the knife, grabbing my hand.” After his trial counsel said, “Okay,” defendant continued: “And it was during that struggle when we struggled that she must have hurt herself.”

⁴ We also need not consider defendant’s claim that the evidence did not support a finding that defendant intentionally cut Doe One underneath her breast.

because there was no substantial evidence that he directly caused the injuries to Doe One's hands.⁵

With respect to the section 12022.7, subdivision (a) allegation, defendant relies on *People v. Rodriguez* (1999) 69 Cal.App.4th 341 (*Rodriguez*). *Rodriguez* held that in order for a section 12022.7, subdivision (a) allegation to be found true, “[t]he defendant must directly, personally, himself inflict the injury.” (*Rodriguez, supra*, at p. 349.) In *Rodriguez*, the jury had to determine whether, in the commission of a prior conviction, the defendant had personally inflicted great bodily injury. (*Id.* at pp. 345-346; see §§ 1170.12, subd. (b)(1), 1192.7, subd. (c)(8).) The prior conviction, for resisting an officer proximately causing serious bodily injury (§ 148.10), involved an officer who was injured while pursuing the defendant, who had escaped from custody. (*Rodriguez*, at p. 346.) The officer had tackled the defendant during the pursuit, resulting in injuries. (*Ibid.*) The jury found the “strike” allegation true after being instructed that personal infliction of great bodily injury could be proved if the defendant’s conduct was the proximate cause of the injury. (*Id.* at pp. 346-347.) The *Rodriguez* court found the instruction erroneous, because “proximate cause is [not] enough to establish personal infliction.” (*Id.* at p. 351.) The court also found the error prejudicial, because the defendant had not “directly inflicted” the injury, since he “did not push, struggle, or initiate any contact with the officer” and the officer had, instead, “injured himself.” (*Id.* at p. 352.)

The Attorney General contends defendant directly caused Doe One’s injuries, as required for the section 12022.7, subdivision (a) allegation, relying on a number of cases including *People v. Elder* (2014) 227 Cal.App.4th 411 (*Elder*). In *Elder*, the defendant

⁵ Defendant concedes that he “directly wounded” Doe One with the knife “when he used both hands to drag her back from the door,” resulting in the laceration under her breast.

hid in a van and then, after the victims began driving the van, brandished a gun and demanded a ride and money. (*Id.* at p. 414.) One of the victims escaped the van, and the other victim (the driver), hit the defendant and drove the van in a manner that threw the defendant backwards and forwards. (*Id.* at p. 415.) The defendant attempted to exit the van, but the door was stuck, and the driver grabbed the defendant by the sweatshirt. As the defendant continued to struggle to get out of the van, the driver's finger got caught in the sweatshirt and “ ‘snapped.’ ” (*Ibid.*) On appeal, the defendant challenged the sufficiency of the evidence to support allegations that he personally inflicted great bodily injury on the driver, arguing that he had not personally inflicted the driver's injuries. The *Elder* court disagreed, distinguishing *Rodriguez* and reasoning: “It was during the volitional act of struggling and attempting to pull away that the victim's injury was inflicted. Defendant was a direct cause of the injury.” (*Id.* at p. 421.)

In this case, as in *Elder*, Doe One's injuries occurred when she grabbed the knife, which defendant was holding, during a struggle. This case is not similar to *Rodriguez*, in which the victim's injuries did not occur during a struggle. (See *Rodriguez, supra*, 69 Cal.App.4th at p. 352.) Here, during defendant's “volitional act of struggling,” Doe One suffered the injuries to her hands, and thus there was substantial evidence to support a finding that defendant was a direct cause of those injuries, as required for the section 12022.7, subdivision (a) allegation. (See *Elder, supra*, 227 Cal.App.4th at p. 421.)

With respect to his conviction under section 243, subdivision (d), defendant relies on *People v. Jackson* (2000) 77 Cal.App.4th 574 (*Jackson*). In *Jackson*, the defendant had pushed the victim up against a car, but her injuries resulted from her act of turning around and tripping. (*Id.* at p. 576.) The defendant was convicted of willfully inflicting corporal injury on a spouse (§ 273.5, subd. (a)), but the *Jackson* court held that section 273.5 is not violated when “the victim's injury does not result from direct physical contact by the defendant.” (*Jackson*, at p. 575.) The court explained that if the victim

had fallen “as a direct result of the blows inflicted by [the defendant], we would conclude that [the defendant] inflicted the corporal injury she suffered in the fall,” but that there was insufficient evidence to sustain such a finding. (*Id.* at p. 580.)

The Attorney General contends that *Jackson* is not authority for the requirements of section 243, subdivision (d). As the Attorney General points out, the language of section 273.5, subdivision (a), which applies when a person “willfully inflicts corporal injury resulting in a traumatic condition,” is different than the language of section 243, subdivision (d), which applies “[w]hen a battery is committed against any person and serious bodily injury is inflicted on the person.”

The Attorney General also contends that *Jackson* is factually distinguishable from the instant case. The Attorney General asserts that the evidence here was sufficient to sustain defendant’s conviction, relying on *People v. Kaiser* (1980) 113 Cal.App.3d 754 (*Kaiser*), which upheld a conviction of battery on a police officer (§ 243.1). In *Kaiser*, the defendant, who was in jail, struck and kicked at officers who were moving him to a safety cell. (*Kaiser, supra*, at p. 767.) When one officer tried to grab the defendant’s leg, the defendant kicked him, causing injury. The appellate court held that the evidence was sufficient to sustain the conviction. (*Id.* at p. 768.)

We agree with the Attorney General that, even assuming a violation of section 243, subdivision (d) requires that the victim’s injury result from “direct physical contact by the defendant” (*Jackson, supra*, 77 Cal.App.4th at p. 575), the evidence here was sufficient to support that finding. As in *Kaiser*, Doe One’s hand injuries occurred during a struggle with defendant, and thus those injuries were a result of “direct physical contact” by defendant. (*Jackson, supra*, at p. 575.)

B. Legal Theory

Defendant contends that even if the laceration under Doe One’s breast could support the jury’s findings that he inflicted great or serious bodily injury, reversal is required because the jury may have relied on the “legally incorrect” theory that he

proximately caused the injuries to Doe One's hands. (See *People v. Guiton* (1993) 4 Cal.4th 1116, 1129 (*Guiton*); *People v. Green* (1980) 27 Cal.3d 1 (*Green*), abrogated on other grounds by *People v. Martinez* (1999) 20 Cal.4th 225.)

In this case, unlike in the *Rodriguez* case, the jury was not instructed that personal infliction of great bodily injury could be proved if the defendant's conduct was the proximate cause of the injury. (See *Rodriguez, supra*, 69 Cal.App.4th at pp. 346-347.) As the jury was not presented with a legally incorrect theory, reversal is not required under *Guiton* and *Green*.

C. Unanimity Instruction

Defendant contends the trial court was required to give a unanimity instruction since there were "two distinct acts" that could have supported the serious bodily injury and great bodily injury findings.

"In a criminal case, a jury verdict must be unanimous. . . . Additionally, the jury must agree unanimously the defendant is guilty of a *specific* crime. [Citation.] Therefore, cases have long held that when the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act. [Citations.]" (*People v. Russo* (2001) 25 Cal.4th 1124, 1132 (*Russo*).)

"This requirement of unanimity as to the criminal act 'is intended to eliminate the danger that the defendant will be convicted even though there is no single offense which all the jurors agree the defendant committed.' [Citation.] . . . 'The [unanimity] instruction is designed in part to prevent the jury from amalgamating evidence of multiple offenses, no one of which has been proved beyond a reasonable doubt, in order to conclude beyond a reasonable doubt that a defendant must have done *something* sufficient to convict on one count.' [Citation.]" (*Russo, supra*, 25 Cal.4th at p. 1132.)

Whether or not a unanimity instruction is requested, it should be given " 'where the circumstances of the case so dictate.' [Citation.]" (*People v. Riel* (2000) 22 Cal.4th

1153, 1199.) “[T]he unanimity instruction is appropriate ‘when conviction on a single count could be based on two or more discrete criminal events,’ but not ‘where multiple theories or acts may form the basis of a guilty verdict on one discrete criminal event.’ [Citation.] In deciding whether to give the instruction, the trial court must ask whether (1) there is a risk the jury may divide on two discrete crimes and not agree on any particular crime, or (2) the evidence merely presents the possibility the jury may divide, or be uncertain, as to the exact way the defendant is guilty of a single discrete crime. In the first situation, but not the second, it should give the unanimity instruction.” (*Russo*, *supra*, 25 Cal.4th at p. 1135.)

Defendant contends that the evidence in this case showed that Doe One’s injuries resulted from “two distinct acts.” He notes that the prosecutor did not elect to rely on either the act causing injury to Doe One’s hands or the act causing injury to Doe One’s chest, arguing that both injuries constituted great bodily injury. And defendant contends that he advanced a different defense for each act, claiming that Doe One “hurt herself” by grabbing the knife and that the laceration under Doe One’s breast was not sufficiently serious as to qualify as great bodily injury. Thus, defendant claims, some jurors may have found serious bodily injury and great bodily injury based on one injury while other jurors may have found serious bodily injury and great bodily injury based on the other injury.

As we have already explained, however, the evidence at trial established that all of Doe One’s injuries occurred during one indivisible course of conduct, such that the jury was required to consider the injuries collectively, not individually, in determining whether defendant inflicted great or serious bodily injury. (See *Robbins*, *supra*, 209 Cal.App.3d at p. 265.) In *Robbins*, the court rejected the same claim defendant raises here. The *Robbins* defendant had entered the victim’s apartment and engaged in a “prolonged assault,” which included intermittent beatings and forcible sexual acts (*id.* at p. 266), causing the victim to suffer a “variety of injuries” (*id.* at p. 264). The court set

forth two reasons why a unanimity instruction was not required as to the great bodily injury allegations. First, the jury was not being called upon to determine which act constituted a crime but to “perform[] a measuring function, deciding whether the victim suffered that quantum of injury legally defined as great bodily injury.” (*Id.* at p. 265.) In making that determination, the jurors could have “differed in their view as to which particular injury or injuries constituted great bodily injury” as long as they unanimously found the injury to be significant or substantial. (*Ibid.*) Second, even if the acts causing the injuries could constitute separate criminal charges, they were “so closely connected in time” as to “form[] part of one transaction. [Citation.]” (*Id.* at p. 266.) Since “the individual blows and other indignities were inseparable components” of the ongoing assault, no unanimity instruction was required. (*Ibid.*)

Here, the injuries to Doe One’s hands and chest both occurred during the struggle that ensued after defendant entered Doe One’s apartment. As in *Robbins*, the charges here stemmed from one “prolonged assault” that resulted in both injuries. (*Robbins, supra*, 209 Cal.App.3d at p. 266.) The jury’s function here was to measure whether the injuries, considered together, met the standards for conviction under section 243, subdivision (d) and for enhancement under section 12022.7, subdivision (a). And although technically Doe One’s injuries were the result of different acts—her grabbing of the knife during the struggle and defendant’s dragging of her body along the floor while holding the knife—those acts were “so closely connected in time” as to “form[] part of one transaction. [Citation.]” (*Robbins, supra*, at p. 266.)

The Attorney General also cites *People v. Jefferson* (1954) 123 Cal.App.2d 219 (*Jefferson*), in which the court rejected the defendant’s claim that the trial court should have required the prosecution to elect one of two acts as the basis for a charge of assault with a deadly weapon. The *Jefferson* defendant had swung a butcher knife at an officer at the beginning of the incident. After the officers took possession of the butcher knife, the defendant took out a pocket knife and used it to slash at the officers. (*Id.* at p. 220.)

The court rejected the defendant's claim that there were "separate and distinct offenses," finding instead that the defendant's acts all occurred during "a continuous effort on the part of the officers to disarm [her]" and that therefore, no election was required. (*Id.* at p. 221.) Here, defendant approached Doe One with a knife and engaged in a struggle with her, during which Doe One's hands and chest were cut by the knife. Even though the two injuries were caused by separate acts, the acts were part of the same struggle over the knife. Therefore, the jury was properly not required to decide which act formed the basis for the serious bodily injury and great bodily injury findings.

The case relied on by defendant, *People v. Hernandez* (2013) 217 Cal.App.4th 559 (*Hernandez*), is distinguishable. *Hernandez* did not involve an ongoing assault or struggle but rather charges of possession of a firearm and possession of ammunition. (*Id.* at p. 563.) The evidence in that case showed that the defendant had possessed a firearm and ammunition during a domestic violence incident and, several hours later, during a search of the car he was driving. (*Id.* at pp. 564-566.) The court held that a unanimity instruction was required because the evidence "was not indicative of one discrete act" but revealed "two discrete acts of possession, either of which could have constituted the charged offenses." (*Id.* at p. 571.) The continuous course of conduct exception did not apply, because the record revealed "the possibility of two distinct possessions separated by time and space," and because the defendant presented two different defenses to each possession, claiming he was not in possession of a firearm during the domestic violence incident and that he did not own the car in which the prohibited items were found. (*Id.* at p. 574.) Here, the injuries to Doe One were not caused by acts that were "discrete" or "separated by time and place." (*Id.* at pp. 571, 574.) The injuries were caused by acts that occurred in the same place, at the same time, during a struggle over the knife. Thus, no unanimity instruction was required.

IV. DISPOSITION

The judgment is affirmed.

BAMATTRE-MANOUKIAN, J.

WE CONCUR:

ELIA, ACTING P.J.

MIHARA, J.